

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

SEP 14 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition
Act of 1992

Rate Regulation

MM Docket No. 93-215

REPLY COMMENTS OF LIBERTY MEDIA CORPORATION

Liberty Media Corporation ("Liberty Media") submits these reply comments in response to the Notice of Proposed Rulemaking ("Notice") in this proceeding. Liberty Media remains concerned that the Commission's cost-of-service proposals unintentionally will inhibit the continued development of diverse and high-quality programming.

The Commission has recognized that the primary concern of Congress in adopting the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") "is with the exercise of market power by cable system operators, and is not with...those entities supplying cable programming, a market in which there is abundant and increasing competition." First Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-177 (rel. May 3, 1993), at ¶8. The legislative history of the 1992 Cable Act confirms that Congress had "no desire to regulate programming." Id. Consequently, Congress "suggested that the

No. of Copies rec'd
List A B C D E

0711

Commission...avoid unnecessary constraints on the cable programming market" in developing regulations to implement the rate provisions of the 1992 Cable Act. Id.

Nonetheless, two issues raised in the Commission's cost-of-service proposal could have a direct and negative impact on the programming expenditures of regulated cable operators and, consequently, on the diversity and quality of cable programming: (1) the extent to which cable operators may recoup the cost of affiliated programming (Notice at ¶67 n.70); and (2) the ability of cable operators to obtain a "profit or mark-up" on programming expenses (Id. at ¶24 n.24).

1. Affiliated Programming Cost Pass-Throughs
By Cable Operators.

In its Notice, the Commission solicited comment on:

[W]hether we should...in this proceeding adopt our affiliate transaction requirements instead of, or as an alternative to, our inflation limitation on pass-through of programming costs incurred with respect to affiliated programmers.

Notice at ¶67 n.70. However, in response to the numerous petitions for reconsideration of that "inflation limitation" in its other rate regulation docket, the Commission already has addressed this issue.

Based on the extensive record before it on reconsideration in Docket No. 92-266, the Commission has decided to permit the pass-through of programming cost increases where the programming cost "reflects either prevailing company prices offered in the marketplace to third parties

...or the fair market value of the programming." 47 C.F.R. §76.922(d)(2)(vi); see First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428 (rel. Aug. 27, 1993) ("First Reconsideration Order"), at ¶114. This approach is consistent with the Commission's affiliate transaction rules governing common carriers¹ and is supported by the comments of cable operators, programmers, state and local regulators, telephone companies and public interest organizations in this proceeding. See Comments of Tele-Communications, Inc. ("TCI") at 58-60; Comments of Time Warner Entertainment Company, L.P. ("Time Warner") at 39-40; Comments of Viacom International Inc. at 57-59; Comments of Discovery Communications, Inc. ("Discovery") at 5; Comments of E! Entertainment Television, Inc. ("E!") at 3-5; Comments of the National Association of Telecommunications Officers and Advisors, the National League

¹ See 47 C.F.R. §32.27. The affiliate transaction rules applicable to common carriers define "affiliated companies" as "companies that directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with, the accounting company." Id. at §32.9000. In Docket No. 92-266, the Commission adopted a much broader definition of "affiliate" for purposes of its cable rate regulations. See First Reconsideration Order at ¶115. Consequently, the Commission's rate regulations must recognize that, unlike common carriers, cable operators do not necessarily have "the power to direct or cause the direction of the management and policies" of their "affiliates" (see 47 C.F.R. §32.9000), and any reporting requirements must be modified accordingly. Alternatively, as Liberty Media has suggested throughout these proceedings, the Commission should define affiliate as an entity which "is controlled by, or is under common control with, another entity." See Comments of BellSouth Telecommunications, Inc. ("BellSouth") at 24.

of Cities, the United States Conference of Mayors, and the National Association of Counties at 13; BellSouth Comments at 25; Comments of Consumer Federation of America at 7.

2. Permissible Cable Operator Profit On Programming Costs.

Commenters with programming interests have responded to the Commission's solicitation in this proceeding and have explained that a "profit or mark-up on programming expense" is appropriate. See Discovery Comments at 3-4; E! Comments at 3-5; TCI Comments at 33-36; Time Warner Comments at 23-24. Such profit or mark-up is necessary to compensate cable operators for the inherent risk in committing to purchase programming services for multi-year terms -- programming which may prove to be unpopular generally or in specific demographic areas or whose popularity may decline over the contract term -- and to minimize the disincentive to further programming investment:

Recognition and reward for this risk will help to ensure that cable operators continue to make socially desirable investments in untried new services, niche programming, and minority-oriented programming.

Time Warner Comments at 24; see Discovery Comments at 4 ("[n]ot only would a margin provide cable operators with a direct financial incentive to add new program services, but it would also help to offset the risk they incur in adding program services"); TCI Comments at 33-35. In addition to incurring multi-year contractual obligations, cable operators

also may expend substantial sums in the launch and promotion of programming services.

Just as any other retailer must obtain a return on its inventory, as well as its store, fixtures and equipment, a cable operator must be able to obtain a reasonable return not only on plant and equipment, but also on its programming expenditures:

In implementing this provision, the Commission should ensure that the cable operators is [sic] able to recover in their entirety the fees paid to cable programmers, plus a reasonable rate of return. These costs should not be subject to offsets of any kind. To do otherwise would directly restrict the ability of cable programmers to obtain the market value of their products. Moreover, it would create a strong disincentive to cable operators to add new programming services, particularly high cost, quality services. This result would, of course, disserve the viewing public.


Comments of the Motion Picture Association of America, Inc. at 2-3; see BellSouth Comments at 9 (without a reasonable mark-up on programming costs, "[c]able operators that consistently use a cost-of-service showing will have less incentive to provide expanded programming.") Although recognizing that the Commission may decide to address a number of subsidiary issues (see First Reconsideration Order at ¶135 n.244), Liberty Media respectfully submits that the Commission's cost-of-service regulations should authorize an appropriate mark-up by cable operators of their programming expenses.

Liberty Media recognizes that the Commission consistently has exhibited its concern with the impact of its

regulations implementing the 1992 Cable Act on the continued improvement in programming quality and expansion of programming diversity. In this proceeding, Liberty Media respectfully requests that the Commission: (1) incorporate its prior determination permitting cost pass-throughs for affiliated programming; and (2) authorize appropriate cable operator mark-ups of programming expenses.

September 14, 1993

Respectfully submitted,


Robert L. Hoegle
Timothy J. Fitzgibbon
Carter, Ledyard & Milburn
1350 I Street, N.W., Suite 870
Washington, D.C. 20005
(202) 898-1515

Attorneys for
Liberty Media Corporation